1995

Nuttall v. North : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

D. SCOTT NUTTALL dba NUTTALL CONSTRUCTION COMPANY,	:	
Appellee/Cross-Appellant,	:	Case No. 950525 - CA
v.	:	
JORDAN NORTH,	:	Priority No. 15
Appellant/Cross-Appellee,	:	

BRIEF OF APPELLEE AND CROSS APPELLANT

4TH JUD. DIST. COURT, IN & FOR UTAH COUNTY
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STATEMENT OF JURISDICTION

This appeal arises from a final judgment of the Fourth Judicial District Court, Utah County, State of Utah, the Honorable Guy R. Burningham presiding. The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2a-3(2)(k) (1992).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

In this matter the defendant below, Jordan North ("North"), *seeks a review of certain findings of fact entered by the trial* court. North claims the evidence presented was insufficient and the findings are "clearly erroneous."

North notes the standard of review on his appeal is the clearly erroneous standard, citing *Alta Industries Ltd. v. Hurst*, 846 P.2d 1282 (Utah 1993) and *Gillmor v. Wright*, 850 P.2d 431 (Utah 1993). However, North fails to set forth for this Court the entire standard as stated in those cases. In *Alta Industries* the Court's full statement the standard is as follows:

> A party seeking to set aside a trial court's findings carries a heavy burden: "To mount a successful challenge to the correctness of a trial court's findings of fact, an appellant must first marshall all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below." [citations omitted.]

Id. at 1286. Identical language is found in *Gillmor*. *Id.* at 433.

Plaintiff D. Scott Nuttall dba Nuttall Construction Company ("Nuttall") has filed a cross appeal. In his cross appeal Nuttall raises four issues for review. However, Nuttall will address in this brief only the following issue:

> Whether the trial court erred in concluding as a matter of law that prejudgment interest is not allowed on this mechanic's lien foreclosure claim.

All other issues raised in the cross appeal are hereby waived.

Whether prejudgment interest is allowed is a question of law. Accordingly, the trial court's conclusion on the question is reviewed under a correction of error standard. *Herm Hughes & Sons, Inc. v. Quintek*, 834 P.2d 582 (Utah Ct. App. 1992); *Warren v. Provo City Corp.*, 838 P.2d 1125 (Utah 1992).

STATEMENT OF THE CASE

This is mechanic's lien foreclosure action. Nuttall is a licensed contractor in Utah County, engaged in the business of building and remodeling personal residences. North was, at times pertinent herein, the owner of a home located in Utah County. Nuttall and North entered into a written agreement whereby Nuttall agreed to remodel and make additions to North's home for the cost of materials and labor plus ten percent. When North breached that agreement and failed to pay, Nuttall ceased any further work on the residence, filing a notice of lien on December 13, 1991.

In response to the complaint, North filed a counterclaim alleging that Nuttall had breached the contract and that North had overpaid for the work performed.

This matter was tried to the court beginning on March 9, 1994. After two days of trial the matter was continued and concluded on June 30 and July 1, 1994. Following trial the court issued a memorandum decision dated November 30, 1994. (R. 1221) After post-trial motions, the memorandum decision was amended. (R. 1269) The trial court entered judgment in favor of Nuttall and against North for the sum of $85,261.64 together with attorneys' fees in the sum of $18,000.00. However, the trial court refused to award prejudgment interest on the amount of the judgment.

STATEMENT OF RELEVANT FACTS

North has included in his brief a lengthy and convoluted statement of the facts of this case. For the most part, North includes in that statement only the testimony given by North, ignoring the testimony of Nuttall and other witnesses. Such a recitation of facts is not necessary. The only facts required to understand this case are given below. These facts are undisputed:

1. Nuttall is a licensed general contractor in the business of building and remodeling homes in Utah County. (R. 696)

2. North was the owner of a home located in Utah County with the mailing address of 4545 Brookshire, Provo, Utah. (R. 514)

3. North hired numerous other contractors prior to Nuttall for the purpose of attempting to remodel and make changes to his home. (R. 514-522)

4. North retained Nuttall to finish the addition to and remodeling of North's home on the basis of time and material plus ten percent, all in accordance with a written agreement signed by both parties. (R. 524; Exhibit 42)

5. During the course of the job, Nuttall sent frequent and periodic statements to North indicating the amount of work accomplished, including labor and materials. Generally these periodic billings included a draw sheet and actual invoices from subcontractors and suppliers. Copies of the billings were introduced, without objection, at the trial as Exhibits 1 through 36 inclusive. (R. 767-782; 798-806)

6. The total value of all labor performed and material supplied to the home of North in accordance with the agreement between the parties was $686,396.69. (R. 809; Exhibit 41)

7. The undisputed amount of payments received from North by Nuttall totalled $535,085.61, leaving a balance due of $151,311.08. (R. 994-95; Exhibit 41)

8. Nuttall ceased any further work on the home because of non-payment by North. At the time Nuttall walked off the project there was much work left to be done and many items were incomplete.

Nuttall never sought recovery for these incomplete items, but only the reasonable value of the work and materials actually furnished to the project. (R. 840)

SUMMARY OF ARGUMENT

Ample evidence exists to support the judgment of the trial court. Pursuant to Utah Code Ann. §38-1-3 (1994), Nuttall is entitled to the value of the services and materials supplied to North's property. The evidence presented to the trial court clearly supports an award of $151,311.08. Not only did Nuttall testify as to the cost of the work done, various subcontractors hired by Nuttall also testified as to their work. Most importantly, these subcontractors, without exception, testified that the amount charged for the work on North's property was normal and customary. This testimony was completely uncontroverted by North.

North has failed to meet the burden imposed on him by the standard of review. It is not appropriate for North to simply reargue the facts of the case because the trial court disagreed with his version. Rather, it is incumbent upon North to first marshall all of the evidence which tends to support the ruling of the court and then show how that evidence is clearly erroneous. Because North has wholly failed to meet this burden, his appeal must be summarily denied.

On the issue raised by the cross appeal, it is Nuttall's position that the trial court erred in denying prejudgment interest. The prevailing law is that where damages can be ascertained through some objective and fixed standard, and where such damages are not, transitory, discretionary or continuing, prejudgment interest is appropriate. In this case, the amount of damages was fixed as of the lien filing date. Nuttall was awarded judgment for a portion of the fixed damages. The portion awarded was itself fixed and ascertainable. Prejudgment interest is therefore appropriate.

ARGUMENT

POINT I: NORTH HAS FAILED TO MEET HIS BURDEN UNDER THE STANDARD OF REVIEW.

North states, at page 1 of his brief, that there are four issues on appeal. In reality, however, North's brief deals with only one issue. Fairly summarized, North argues (Point 1) that the findings of fact are not supported by the evidence and are therefore clearly erroneous. North then argues (Point 2) that since the findings are not supported by the evidence, the conclusions of law are necessarily erroneous. Thus, in effect, North makes a single argument which is that the findings of fact of the trial court are not supported by the evidence.

A. North Has Failed to Marshall the Evidence. The controlling case law is uniform in imposing a very specific burden upon any

party who seeks to convince this Court that the trial court erred in its findings of fact. The responsibility of the trial court is to consider conflicting testimony and evidence, weigh the credibility of the witnesses and exhibits presented and make a factual determination based upon what it sees and hears. As such, the work of the trial court is given deferential review. *See Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989).

Given that deference, any party attacking the findings of the trial court has a specific responsibility. In order to have his arguments even considered, the appellant must first set before this Court every bit of evidence which tends to support the trial court's findings and then show how, despite such evidence, the findings of the court are clearly erroneous.

In *Grayson*, the Supreme Court stated:

> To successfully attack a trial court's findings of fact, an appellant must first marshall all the evidence in support of the findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack. . . . .

Id. at 470. *See also Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992); *Alta Industries Ltd. v. Hurst*, 846 P.2d 1282 (Utah 1993).

More importantly, the case law is specific in its requirement that the act of marshalling all evidence in support of the findings is a condition precedent to consideration of the arguments as to the sufficiency of the evidence. In other words, unless the

appellant has successfully completed the task of marshalling, the appeal is to be dismissed without further discussion.

The line of cases which illustrates this point begins with *Scharf v. BMG Corp.*, 700 P.2d 1068 (Utah 1985). In that case the appellant attacked the trial court's factual findings, arguing that the factual findings were not supported by the record. The Supreme Court summarily dismissed such arguments citing the appellant's failure to marshall the evidence. On that point the Court stated:

> The challenges to the factual findings can be disposed of readily. Erickson makes numerous arguments based on the facts as he presented them to the trial court, rather than on the facts as found by that court. . . . With respect to these matters, we take as our starting point the trial court's findings and not Erickson's recitation of the facts. To mount a successful attack on the trial court's findings of fact, an appellant must marshall all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings. [citations omitted] **Erickson has not begun to carry that heavy burden. Nowhere does he marshall the evidence supporting his version of the facts, much less the evidence supporting the trial court's findings. Under these circumstances, we decline to further consider Erickson's attack on the factual findings.**

Id. at 1069-70 (emphasis added) (citations omitted).

Similarly, in *Ashton v. Ashton*, 733 P.2d 147 (Utah 1987), the appellant's attack on findings was dismissed out of hand because the appellant had failed to meet its threshold burden of marshalling all evidence. The Court stated:

> The Court begins its analysis with the trial court's findings of fact, not with an appellant's view of the way he or she believes the facts should have been found. Defendants have not even begun to seriously discuss the trial court's findings that dispute their version of the facts. In *Scharf v. BMG Corp*, we explained the duty incumbent upon an appellant to mount a successful challenge to a trial court's findings of fact. An appellant must marshall all of the evidence in support of the trial court's findings. **Only then can we consider whether those findings are "clearly erroneous." Because defendants have failed to make such a showing, the trial court's findings will not be disturbed.**

Id. at 150 (emphasis added).

In the case at hand, North has, in the words of the Supreme Court, "not even begun" to marshall the evidence supporting the findings. A fair reading of North's brief shows that it contains nothing more than a rehashing and a reargument of North's version of the facts. At no point does North set out all of the evidence on any specific factual finding which was presented by Nuttall and then show that evidence to be insufficient.

For example, North attacks the word "changes" found in findings of fact 7 and 13. However, at no place in the brief will the Court find a marshalling of the numerous references to changes which were described by Nuttall and his subcontractors. In order to properly marshall the evidence on the issue of "changes", North should have, at a minimum, noted the following testimony from Nuttall on this issue:

1. Additional work in the master suite not originally contemplated by the contract. (R. 710)

2. No bid given for the additional work in the master suite. (R. 712)

3. Discussions regarding the fact these changes to the master suite would result in additional time charges. (R. 713)

4. Changes to the office on the back of the house. (R. 713)

5. Changes to the kitchen. (R. 714)

6. Changes to the entry way. (R. 715)

7. Further references to numerous changes. (R. 716)

8. Changes made by the interior decorator. (R. 718)

9. References to numerous other smaller changes. (R. 718-20)

10. Reference to the numerous times that Mr. North simply changed his mind on work that was being done. (R. 722)

11. Examples of work that was constantly changed requiring "tear out and redo". (R. 724)

The foregoing is illustrative of the failure of North to marshall the evidence as required by the standard of review. North's idea of marshalling of such evidence is to state, at page 19 of his brief, that "Scott Nuttall's testimony is replete with generalizations that North was continually changing his mind," without even an attempt at a reference to the actual testimony. The record, however, is replete with specific instances of

testimony given by Nuttall and by the subcontractors, all of which was uncontroverted by North or his witnesses. Assembling these specific references and setting them before the Court are part of North's burden.

Similar analyses of North's other complaints about the findings of fact can be made. In essence, North does nothing more than argue that the trial court should not have believed the evidence, not that the evidence was insufficient. North lost at trial making the same arguments. A retrial of the facts is not appropriate before this Court.

North has failed to meet his threshold burden. North knows that if he were actually to marshall all of the evidence on these various points, there would be but one conclusion: that the trial court's findings were supported by the evidence. On this basis alone, the North's appeal should be dismissed.

B. <u>There is Ample Evidence to Support the Findings of the Trial Court</u>. It is not Nuttall's responsibility to show that there is more than sufficient evidence to support each of the findings of the trial court. However, some examples of the testimony will illustrate that the trial court was well within its right to enter the findings of fact and to conclude that the plaintiff was entitled to judgment. North raises, in one form or another, objections to the following findings:

1. **Findings 7 and 13**. Examples of the specific evidence upon which the trial court could rely for Findings 7 and 13 has been given above. In addition, numerous other witnesses testified as to the constant changes and additional work which North requested. For example, Mr. Bill Mammen, an architect, testified that he was hired to make substantial changes to the second floor of the structure (R. 731), that the changes were done on top of the addition to the home (R. 731), that there were changes to the kitchen over and above the addition to the home (R. 732), and that design changes were made to the entry way and to the recreation room in the basement level. (R. 733)

Mr. Scott Wright, a subcontractor, testified:

> Yeah. It was the common idea that when we came down there was a change every time we came down.

(R. 595) Mr. Wright then gave a specific example of the changes to which he referred. (R. 596-97) Similar testimony was given by Mr. Jerry Nielsen, a flooring contractor (R. 622), by Mr. Eric Hundley, a painting contractor (R. 634), by Mr. David Johnson, a carpeting contractor (R. 649), by Mr. Reid Erdman, an electrical contractor (R. 663), and by Mr. Russel Necaise, a masonry contractor. (R. 674)

2. **Findings 8, 9 and 10**. Apparently, North claims that these findings are not supported by the evidence. This claim is not only confusing, but ludicrous.

Finding No. 8 states Nuttall maintained records of work performed and gave periodic billings to North. The supporting evidence is found in the first 36 exhibits, together with Mr. Nuttall's clear testimony. (R. 782-794) North's claim that the court had no basis for finding that Nuttall maintained records and gave periodic billings is nothing short of a mystery.

Similarly, Finding No. 9 deals, in essence, with the fact that North requested and that Nuttall and several subcontractors accepted trades in lieu of cash payments. Not only did Nuttall and each one of the subcontractors testify as to trades, but North, himself, admitted that trades were used. Indeed, North stipulated that trade payments were made. (R. 538)

Finally, Finding No. 10 states that Nuttall billed North normal and customary charges plus ten percent. On this issue each one of the subcontractors listed above, without exception, testified that they billed normal and customary charges. (See references to the record above.) More importantly, at no time did North produce another contractor, another subcontractor or any other expert who could speak on the issue of the amount billed by Nuttall or who could give an opinion that the amount billed was in excess of normal and customary charges for labor and materials.

3. **Findings 16, 17, 14 and 11.** In addition to the foregoing, North at least mentioned, in passing, Findings 16, 17, 14 and 11.

It is respectfully submitted, however, that in his brief North does nothing more than to argue against the findings. There is no evidence given in the brief to show how any of those findings are incorrect. All that North does is to argue either the weight to be given the finding or the fact that North disagreed with the finding.

A perfect example is North's treatment of Finding No. 16 on page 31 of his brief. There, after setting forth the finding (which was to the effect that Nuttall had submitted a bill to North on October 30, 1991) North argues: "However, no evidence exists or was presented that this letter/exhibit is accurate in any way whatsoever." The fact of the matter is that this exhibit was offered at trial by North as evidence of what North thought was due and owing as of the date of the statement. (Exh. 44) It is simply incomprehensible that North, having introduced the exhibit himself, would then argue that there is no basis for its sufficiency as evidence.

C. Conclusion. North has failed miserably at marshalling for this Court all of the evidence upon which the trial court could rely for its findings. Having failed, North is not entitled to be heard on his arguments as to the sufficiency of the evidence which he failed to set forth. Even if North had met his burden, however, there is a massive amount of information in the record upon which each of

the findings can be supported. That North disagrees with the conclusion made by the trial court is of no moment. Each of the findings is adequately supported. North is not entitled to retry his case before this Court. The appeal, in its entirety, should be dismissed.

POINT II: THE DISTRICT COURT ERRED IN NOT AWARDING PREJUDGMENT INTEREST.

The trial court determined Nuttall is not entitled to prejudgment interest "[b]ecause the amounts awarded were legitimately in dispute and unliquidated . . . ." (R. 1291) The trial court's decision on this point presents a question of law which this Court reviews for correctness. *Andreason v. Aetna Casualty & Sur. Co.*, 848 P.2d 171, 177 (Utah Ct. App. 1993).

Utah law on prejudgment interest is well established. Whether or not a claim is unliquidated or in dispute, prejudgment interest should be awarded "in situations where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time." *Id.* As demonstrated by the trial court's own findings, the test for awarding prejudgment interest is satisfied in this case.

A. <u>The Damage is Complete and Can Be Measured As of a Particular Time</u>. Under Utah law, prejudgment interest is generally allowed if "the damage is complete and the amount of the loss is fixed as of a particular time . . . ." *Bjork v. April Industries, Inc.*, 560

P.2d 315, 317 (Utah 1977), *cert. denied*, 431 U.S. 930, 97 S. Ct. 2634 (1977).

In this case, the damage was complete and the loss fixed as of the end of October 1991. The trial court found North decided to stop paying Nuttall in October 1991. (R. 1292) North then gave Nuttall notice of his decision, anticipatorily breaching the parties' contract. (R. 1292) Nuttall submitted his final bill to North on October 30, 1991. (R. 1292) When North refused to pay the bill, Nuttall recorded his lien on December 13, 1991. (R. 1292)

The trial court apparently concluded Nuttall's loss was not fixed as of a particular time because North disputed the final bill. This conclusion effectively grants any party who might be liable for prejudgment interest the power to avoid the liability by simply disputing the amount of the underlying claim. Utah law does not support this anomalous result. If entitlement to prejudgment interest depended on whether the defendant disputed the principal debt, prejudgment interest would almost never be awarded since, by definition, a lawsuit involves an underlying dispute.

The law of prejudgment interest is not concerned with the parties' dispute. Rather, the proper focus of inquiry is on the factors which allow certainty in calculation, such as complete damages and a loss fixed as of a particular time. *See Andreason*,

848 P.2d at 177. If these factors are present, and the loss can be measured by facts and figures, it is of no consequence that one party disputes the loss.

The trial court's own findings establish the breach of contract and consequent damages were complete and fixed as of the end of October 1991. That North disputed the amount of loss does not change the date it was complete and fixed. The trial court erred in concluding this dispute is the basis for denying rather than awarding prejudgment interest.

B. The Loss Can Be Measured by Facts and Figures. The second half of the test for determining entitlement to prejudgment interest requires that the loss be measurable "by facts and figures . . . ." *Bjork*, 560 P.2d at 317. The question is whether the damages can be ascertained through some objective, fixed standard, rather than an assessment based on discretion or subjective judgment. *Id.*; *See also Andreason*, 848 P.2d at 177.

The trial court apparently concluded Nuttall's claim failed to meet this part of the test since the claim was "unliquidated . . . ." (R. 1291) Nuttall respectfully suggests that the trial court used the term "unliquidated" in an improper sense. "Unliquidated" means "not ascertained in amount." *Blacks Law Dictionary* 800 (5th ed. 1983). As the trial court found, Mr. Nuttall had ascertained the amount of his claim by reference to the records he maintained.

(R. 1293) That North disputed the amount ascertained by Nuttall does not render the amount unliquidated. Nuttall's claim was liquidated from the date he recorded his lien.

More importantly, whether the claim was unliquidated is legally irrelevant. Almost 90 years ago the Utah Supreme Court recognized "where the damage is complete, and the amount of the loss is fixed as of a particular time, there is -- there can be -- no reason why interest should be withheld merely because the damages are unliquidated." *Fell v. Union Pacific Ry. Co.*, 88 P. 1003, 1006 (Utah 1907). The *Fell* court went on to emphasize the point:

> The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value.

Id. at 107; *see also Andreason*, 848 P.2d at 177 (noting that "[a]lthough damages may be unliquidated, they must be calculable through a mathematically certain procedure allowing the court or the jury to fix the amount . . .").

Applying these principles to this case, the second part of the prejudgment interest test is obviously satisfied. Although the

trial court did not disclose the precise basis for its award, it is apparent the court was guided by facts and figures "and known standards of value . . ." rather than its subjective judgment. The sum awarded, $85,261.64, is specific. An even, rounded number is expected if the award can not be calculated with mathematical accuracy.

Moreover, the trial court provides some insight into its calculations. After concluding "the sum of $85,261.64 is due and owing by the defendant to the plaintiff for labor and materials furnished . . .," the court notes "[t]his amount includes all offsets for items that the plaintiff did not have sufficient documentation to support, and items for which the defendant was charged and either did not receive or had to pay to have finished." (R. 1291) In other words, the trial court determined the amount of its award using mathematical calculations, deducting for offsets and overcharges. Nuttall's loss was measured by facts and figures, satisfying the second part of the prejudgment interest test.

C. Prejudgment Interest is Routinely Allowed in This Context. Mechanic's lien claims, by statutory prescription, involve a particular sum demanded as of a particular date based on calculations made from documentary evidence, such as invoices and payment ledgers. These attributes lend mechanic's lien claims the kind of certainty courts look for in determining whether

prejudgment interest will be allowed. Because of this certainty, prejudgment interest is almost always awarded in mechanic's lien foreclosure actions.

A recent example from Kansas is *J. Walters Construction v. Greystone South Partnership*, 817 P.2d 201 (Kan. Ct. App. 1991). Two construction lenders appealed from the trial court's determination that contractors' mechanic's liens had priority over certain mortgages. The lenders argued the contractors were not entitled to prejudgment interest since their "claims were not liquidated until trial." *Id.* at 208. The appellate court held the claims were sufficiently certain to allow prejudgment interest from the date the liens were filed, despite the existence of offsets and counterclaims. *See Id.* at 208-10.

Likewise, in *Horseshoe Estates v. 2M Co., Inc.*, 713 P.2d 776 (Wyo. 1986), the property owner appealed the trial court's judgment foreclosing a material supplier's mechanic's lien and awarding prejudgment interest. Again, the owner argued the claim was unliquidated. The Wyoming Supreme Court disagreed, noting "this was a liquidated claim because it was and is susceptible of calculation by reference to the contract and the invoices." *Id.* at 781.

Utah also recognizes the propriety of prejudgment interest in the construction context. In *Davies v. Olson*, 746 P.2d 264 (Utah

Ct. App. 1987), this Court affirmed an award of prejudgment interest in favor of a contractor and against an owner. Although no enforceable contract existed between the parties, the Court allowed recovery on a *quantum meruit* theory and decided prejudgment interest should be awarded from the "date that defendants acknowledged an obligation to pay plaintiffs . . . ." *Id.* at 270. *See Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298, 1301 (Utah 1982) (holding the "general rule for prejudgment interest in Utah is that an unpaid subcontractor (materialman) is entitled to interest from the contractor when the last materials have been furnished and the payment therefor is past due.").

The common element in these cases is the ability of the court to set the damages by reference to facts and figures and mathematical calculations. While the trial court is entitled to some discretion as to which facts and figures it will accept, the decision of the trial court is still based upon those facts and figures, and not some discretionary or subjective standard.

In this case, the trial court determined the amount of its award by reference to the evidence offered by Nuttall on the amount due, and the evidence offered by North on offsets and overcharges. The starting point for the court's calculation was the amount due at the time North breached the parties' agreement. The damage was complete and the loss fixed on a particular date, with damages

calculable based on facts and figures. Prejudgment interest should have been awarded. The trial court erred in reaching a contrary conclusion.

CONCLUSION

North's appeal represents nothing more than an attempt to rehash and reargue the facts. The defendant has given no attention to the requirement to marshall the evidence. If a proper recitation of the facts and evidence had been presented it would be apparent that the trial court was well within its bounds to enter judgment in favor of plaintiff. North's appeal should be denied.

Under the controlling law, prejudgment interest is appropriate and should be awarded. To deny prejudgment interest on the basis that it was "disputed" gives to every debtor the right to avoid his just debts by simply claiming that he does not agree with the amount owed. Accordingly, the matter should be remanded to the trial court with instructions to award prejudgment interest from the date of recording of the lien.

Under Utah statute a contractor is entitled to recover attorneys' fees on a foreclosure action. Nuttall has been required to defend this matter, yet again, before this Court. The fees expended by Nuttall on appeal were as necessary to the result as were the fees expended at trial. This Court should remand this

matter for further proceedings before the trial court including the entry of additional attorneys' fees.

DATED this 27th day of November, 1995.

DART, ADAMSON & DONOVAN

CRAIG G. ADAMSON
DUANE R. SMITH
ERIC P. LEE

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of November, 1995, a true and accurate copy of the foregoing was mailed, postage prepaid, to the following:

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